STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2007
v	No. 265005 Livingston Circuit Court
KEITH ALLEN TACKETT, Defendant-Appellant.	LC No. 04-014639-FH

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) and (b). For the reasons stated below, we affirm.

I. Facts

The victim, defendant's adopted daughter, testified that defendant touched her inappropriately on three occasions. The victim recalled that, when she was nine years old, defendant rubbed the "crotch" of her underwear with his hand as she was falling asleep. Defendant then placed his hand inside her underwear and rubbed her vagina. The victim testified that a similar incident occurred when the victim was 12 years old. According to the victim, the third incident occurred on May 28, 2004, when she was 15 years old. The victim testified that as she began to fall asleep on defendant's lap, defendant rubbed her genitals through her shorts and touched her breasts through her shirt.

Defendant denied that he touched the victim's genitals, but he admitted that he touched the victim's breast. However, defendant testified that his conduct was inadvertent because he fell asleep and, when he awoke, he realized that his hand was resting on the victim's breast. Defendant testified that, when he saw this, he immediately moved his hand. Defendant testified that he had no memory of placing his hand on the victim's chest, and he thought the victim may have placed it there. When the victim and her mother confronted defendant, he stated that the victim "was not lying." When asked what he meant by that statement, defendant said, "I felt very awkward about where my hand was. . . . . And I felt she obviously . . . noticed that my hand was there and misunderstood."

II. Analysis

A. Other Acts Evidence

At trial, the prosecutor moved to admit the testimony of Kellie Peterson, defendant's stepdaughter. Peterson intended to testify that defendant previously fondled her breasts. The prosecutor argued that the evidence was relevant to show intent and an absence of mistake under MRE 404(b). The trial judge initially denied the prosecutor's motion to admit the evidence, but reversed its ruling after defendant testified that, though he touched the victim's breast, his conduct was unintentional. The trial court ruled that Peterson's testimony was relevant to show intent and an absence of mistake or accident. The trial court admitted the evidence for those purposes and instructed the jury accordingly. Peterson then testified that, when she was 13 or 14 years old, she was sleeping alone in her bedroom and awoke when defendant fondled her breasts.

Defendant argues that the trial court should not have admitted Peterson's testimony under MRE 404(b). We review a trial court's decision to admit evidence for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). If the trial court's decision is within the range of reasonable and principled outcomes, it has not abused its discretion. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Evidence of a defendant's prior bad acts is inadmissible to show a propensity to commit such acts. *Crawford*, *supra* at 383. However, other acts evidence is admissible if it meets three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

We disagree with defendant's assertion that Peterson's testimony was offered for an improper purpose. Evidence of other bad acts may be admissible as "proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity or absence of mistake or accident . . . ." MRE 404(b). To establish second-degree criminal sexual conduct, the defendant must have *intentionally* touched the victim's intimate parts. MCL 750.520c; *In re Wentworth*, 251 Mich App 560, 561; 651 NW2d 773 (2002). Here, the trial court correctly reasoned that issues of intent, mistake or accident, arose when defendant admitted that he touched the victim's breast, but claimed that the act was inadvertent. The evidence was offered for a proper purpose and was clearly relevant to establish defendant's intent and absence of mistake or accident.

Defendant asserts, however, that Peterson's testimony had no relevance to the victim's allegation that he touched her genitals. Again, however, the evidence was clearly relevant to establish that defendant intentionally fondled the victim's breasts. When evidence is admissible for one purpose, and not admissible for another purpose, a trial court may restrict the use of the evidence to its proper scope and instruct the jury accordingly. MRE 105. This occurred here and, that the evidence may have been unrelated to another charge does not preclude its admission.

Defendant also claims that Peterson's testimony was unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d

417 (2001); MRE 403. While the challenged evidence may have been damaging to defendant's position, it was highly probative because it established the essential issue of intent at trial. Moreover, the trial court offered cautionary instructions to the jury and this eliminated any alleged prejudice.

B. Motion for Mistrial

Defendant maintains that the trial court erred when it denied his motion for a mistrial. We review a trial court's decision to deny a mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). A mistrial should be granted only for an irregularity that results in prejudice to the defendant and impairs his ability to get a fair trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

After Peterson testified that defendant fondled her breasts, the prosecutor asked her if "anything like this ever happen[ed] again[.]" In response, Peterson said, "Yes." Though the prosecutor asserted that Peterson's answer was unexpected, defense counsel objected immediately and later moved, unsuccessfully, for a mistrial.

Defendant asserts that the exchange between the prosecutor and Peterson suggested to the jury that defendant committed more than one sexually abusive act against Peterson. Defendant contends that this prejudiced him because it alluded to other acts evidence outside the scope of plaintiff's MRE 404(b) notice and the trial court's ruling that admitted the MRE 404(b) evidence.

The purpose of the MRE 404(b)(2) notice requirement is to prevent unfair surprise and provide an "opportunity to marshal arguments regarding both relevancy and unfair prejudice." *People v VanderVliet*, 444 Mich 52, 89 n 51; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994). Here, it is undisputed that the prosecutor's notice and the trial court's ruling encompassed the single incident when defendant fondled Peterson's breasts. Accordingly, an *intentional* attempt to introduce additional other acts evidence would have been inappropriate as outside the scope of the notice. However, we find no merit to defendant's assertion that the prosecutor's question was an intentional attempt to introduce additional bad-acts evidence.

Unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would respond in the manner indicated or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990); *People v Barker*, 161 Mich App 296, 307; 409 NW2d 813 (1987). Here, it is clear that Peterson's answer was not the answer the prosecutor expected. The prosecutor stated, numerous times, that she thought Peterson's answer would be "no," and the trial court agreed that Peterson's allusion to other instances was "inadvertent." We agree that the introduction of Peterson's answer was inadvertent and that the prosecutor posed the question to Peterson in good faith.

Further, defendant has provided no evidence that the question and answer denied him a fair trial. In extreme cases, a prosecutor's probing into improper subject matter can be so prejudicial that the error cannot be corrected. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). However, not every mention of some inappropriate subject warrants a mistrial. *Id.* at 36. Here, the meaning of the prosecutor's question was ambiguous, and Peterson's answer

was unexplored. Peterson's affirmative response merely *suggested* that defendant committed more than one sexually abusive act against her. In light of all the evidence against defendant and Peterson's testimony as to one intentional act of sexual misconduct, we find no merit in defendant's argument that the isolated question and answer denied him a fair trial.

Moreover, we note that, if the potential for prejudice exists, a "trial judge must always consider the possibility of curing error with a warning." *People v Johnson*, 396 Mich 424, 438; 240 NW2d 729 (1976), repudiated on other grounds *People v New*, 427 Mich 482; 398 NW2d 358 (1986). Here, however, defendant specifically requested that the trial court refrain from giving a limiting instruction. The trial court acquiesced to defendant's request. At the close of proofs, however, the trial court instructed the jury to consider evidence of defendant's prior acts only to determine whether defendant acted intentionally when he touched the victim. This instruction served to cure any unfair prejudice to defendant arising out of Peterson's testimony. Clearly, this incident did not warrant a mistrial. See *People v Stewart*, 199 Mich App 199, 200; 500 NW2d 756 (1993); *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992); *People v Barker*, 161 Mich App 296, 307; 409 NW2d 813 (1987).

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder